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Issue Date: 23 July 2004

CASE NO. 2000-LHC-0534:
OWCP NO. 06-0171030

In the Matter of

RODNEY L. FISHER,
Claimant,

v.

STEVENS SHIPPING &
TERMINAL CO.,
Employer,

ARM INSURANCE SERVICES,
Carrier..

Daniel C. Shaughnessy, Esq.
Jacksonville, Florida
For the Claimant

Mary Nelson Morgan, Esq.
Jacksonville, Florida
For the Employer/Carrier

BEFORE: MOLLIE W.NEAL
Administrative Law Judge

DECISION AND ORDER ON REMAND

This matter is before me on remand from the Benefits Review Board (the "Board") with instructions that I weigh the evidence regarding the claimant's psychological condition in addressing whether the employer met its burden of demonstrating suitable alternate employment. Consistent with the Board's remand order and decision, I make the following findings.

The claimant injured his back on August 9, 1996, while working for the employer as a lasher/driver. The claimant subsequently underwent a diskectomy and fusion at L4-5 and L5-S1 on May 22, 1997. Thereafter, in September 1998, the claimant was admitted to a facility for treatment of psychological and substance abuse problems. The employer voluntarily paid the claimant temporary total disability compensation, based upon an average weekly wage of $399.61, from August 10, 1996 to March 14, 1998, at which time it alleged that it had established the availability of suitable alternate employment which the claimant was capable of performing with no loss in wage-earning capacity. In my original decision and order I found that the claimant had reached maximum medical improvement on January 23, 1998, that the employer had established the availability of suitable alternate employment paying in excess of claimant's average weekly wage at the time of his work-injury, and that the claimant did not establish due diligence in seeking such employment. Accordingly, I determined that the claimant did not presently have a loss of wage-earning capacity, and therefore found that the claimant was not entitled to further disability compensation.

In remanding this matter, the Board found the evidence (labor market surveys, rehabilitation counselor's testimony, and medical restrictions by the claimant's physician), sufficient to establish suitable alternate employment based on the claimant's physical restrictions alone. However, the Board noted that the employer must produce evidence of jobs which the claimant is capable of performing given his mental and psychological capabilities, as well as his physical restrictions.

In the instant case, the claimant alleges that his physical restrictions and ongoing depression resulted in an inability to work. The Board's summary of the evidence submitted by the Claimant in support of that claim is restated herein. That evidence includes a Rating Decision from the State of Florida Department of Veterans' Affairs, medical records from Charter-By-The-Sea Behavioral Health System, and a report and testimony of Mr. Spruance, a vocational counselor. The Rating Decision contained a finding that the claimant had major depression, with an assessment of global functioning of 25-30. *See* Clt. Ex. 1. The extensive medical file complied by Charter-By-The-Sea reveals that the claimant was admitted to that facility from September 11, 1998, through September 22, 1998, for the treatment of depression, which he related to his ongoing back pain, and narcotic dependency, that claimant was ultimately diagnosed with major depression and substance abuse, and that the claimant, upon discharge was referred for outpatient care. *See* Clt. Ex. 4. After reviewing the claimant's medical files, Mr. Spruance, who has continued to assist the claimant subsequent to 1998, found the claimant to be unemployable based upon his understanding of the claimant's physical and psychiatric conditions. *See* Clt. Ex. 2; Tr. At 41-52. Additionally, the claimant testified that he continued to receive psychiatric care and take medications for his depression. *See* Tr. At 24-26.

The Board noted that in discussing Mr. Spruance's opinion, I stated the Mr. Spruance "admitted that the psychiatric records he reviewed did not indicate any psychiatric restrictions on the claimant. D & O at 14-15. Mr. Spruance explained the medical foundation for his opinion, testifying that he relied on the GAF rating of the claimant in the clinic records and the records of Dr. Kaleel, a VA doctor. Mr. Spruance explained that the global assessment of functioning, or GAF, is an overall evaluation of the "limiting aspects of the psychiatric condition." Tr. at 45. Mr. Spruance stated that the claimant's GAF was assessed at 25-30 on admission to Charter By-

The-Sea, which reflects the acute stage he was in at that time, and at 50 by Dr. Kateel in October 1998. Tr. at 45. Mr. Spruance had opined that GAF goes from 0 to 100 and a score of 50 is incompatible with employment. When asked about specific restrictions based on the claimant's psychological condition, he acknowledged that he had not seen any, but stated that the GAF, while "not exactly a psychiatric limitation… is a reflection of the individual's capacity." Tr. at 51-52. The Board found that this evidence, if credited, could establish that the claimant's employability is limited by his depression.

The Board also noted that Mr. Spruance referred to the records of Dr. Kaleel, a VA doctor, but that the records of that doctor do not appear in the record. It further noted that the claimant testified that after his discharge for Charter By-The-Sea he continued psychiatric care with Dr. Kaleel and a Dr. Saley, whom he found on his own. No reports from this treatment are in the record.[1]

In my original decision and order, I reviewed the claimant's medical records from Charter-By-The-Sea and found that those records did not address how that treatment would affect the claimant's employment, or whether his psychological problems are related to the back injury at work." D & O at p. 15, n.7. Focusing on causation, I found that the only mentions of the work injury are notations in the claimant's history and that no psychiatrist stated that his psychological problems are related to his work-injury. Thus, I concluded that the claimant failed to show a causal connection between his psychiatric problems and his August 9, 1996, work-injury. The Board notes that I must consider the "specific capabilities of the claimant, this is, his age, background, employment history and experience, and intellectual and physical capacities," and thus, whether his depression is work-related is not dispositive. (Had the issue of the causation of the claimant's psychiatric/psychological condition been dispositive, it is clear that the records and opinion of Dr. Rogozinski, *infra*, are sufficient to rebut the presumption of causality and the claimant would not have proven entitlement based on a weighing of the evidence as a whole.)

It is well established that the claimant bears the initial burden of establishing a prima facie case that he cannot perform his former job as a result of a work-related injury. Once the claimant has met his initial burden, the burden then shifts to the employer/carrier to point to a specific job that the claimant is capable of performing in order to demonstrate that suitable alternate employment exist. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). In the instant case there is no question that the claimant has established a prima facie case of total disability. It now must be determined whether the employer has established suitable alternate employment, particularly in light of the claimant's psychological condition.

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[1] Upon remand of the case to this Office, Daniel Shaughnessy, Esq. entered his appearance as Claimant's newly retained attorney. Claimant, through his counsel, filed a Brief in support of his claim, and sought to reopen the record and to schedule a de novo hearing on the issue of suitable alternate employment. That request is not granted and this decision will be based on the evidence adduced during the hearing.

I agree with the Board that the record is less than fully developed regarding the nature and extent of Claimant's psychological condition. However, the decision whether to allow the parties to further develop the issue by the submission of new evidence on remand is discretionary. See, *Meecke v. I.S.O. Personnel Support Dep't*, 14 B.R.B.S. 270 (1981). I find the record adequate to enable me to reach a determination on the issue; and decline to reopen it or to schedule a de novo hearing.

Suitable Alternate Employment in Lieu of Psychological/Mental Condition

The psychological records provided by Charter-By-The-Sea document treatment from September 11, 1998 to September 22, 1998. The claimant was self-admitted for major depression and drug abuse. In the initial intake information the risk factors included the fact that the claimant was divorced, had financial difficulties, had legal difficulties, was abusing alcohol and heavy drugs, was hopeless, had insomnia, and was hostile. There was nothing to indicate that the work-related injury itself was even a risk factor considered in treatment for depression. The intake summary also indicated that the claimant was angry at both his physician and the insurance company because he felt that he loss his workers compensation because of them. It further indicated that the claimant had once seen a psychiatrist in the service to get his duty changed.

The authorized physician had not prescribed any medication since April of 1998. Although there are references to GAF scores which are relied on by the claimant's vocational expert in coming to his conclusion that the claimant was unemployable, there is no medical opinion in the record with regard to those scores. The opinions of a vocational expert can be considered with regard to employability, but should not be weighed more heavily than the opinion of a board certified medical provider.

There was no mention of psychiatric or psychological problems at the time the claimant was released at maximum medical improvement on January 23, 1998 or when the claimant was told he needed to return to work in May of 1998. The initial labor market survey was completed in March of 1998 with numerous jobs available for the claimant within the job restrictions imposed by his treating physician. Dr. Rogozinski's records, during the same period, indicate no psychological problems and no referral to any other specialist.

Dr. Rogozinski' has seen and treated the claimant on numerous occasions from 1996 through 1999. At no time has Dr. Rogozinski felt the need for psychological or psychiatric referral. Dr. Rogozinski stated that he had a lengthy discussion with the claimant on May 12, 1998 and that at that time he did not see any indication for pain management or psychological care. The claimant saw him on October 30, 1998, just six weeks after his in-patient stay at Charter-By-The-Sea with no mention of any psychological or psychiatric complaint, impairment, or recommendation.

A review of Dr. Rogozinski's records note on May 23, 1997 (E/C Ex. 1, p 156), that following surgery the claimant's first question to the doctor was "what is the most disability I can get from my surgery." Dr. Rogozinski did assign a 17% permanent partial impairment rating, but said the claimant's fusion was solid and that he could work with medium restrictions. A functional capacity evaluation performed on the claimant showed an invalid effort and once again is an example of the claimant's lack of interest in returning to work.

When discussing potential psychological issues, Dr. Rogozinski was asked on several occasions at his deposition whether or not he would have considered psychological treatment in this case had he felt it necessary. Dr. Rogozinski testified that he had discussed psychiatric treatment with the claimant but felt it was not necessary. He testified that in the general course

of his practice, if he felt a referral was necessary, he would have provided that referral for psychiatric treatment. The doctor acknowledged that his restrictions did not take into account any referral for psychiatric limitations, but he also did not feel that any psychiatric limitations were indicated. The doctor had reviewed the documentation from the Veterans Administration's office and that, in and of itself, did not change his opinion with regard to the claimant's ability to return to work. He specifically said he took the letter into account, but felt that it did not impact on the restrictions placed upon the claimant. E/C Ex. 1, p. 39.

Dr. Rogozinski acknowledged that, during his treatment of the claimant, there were certain features and types of behavior that he would look for in terms of recommending psychiatric care. Dr. Rogozinski indicated that each person's situation is different, but that having feelings of depression after major surgery in and of itself is not a pathologic or disease state. He explained that sometimes "having these feelings is just part of the healing process and does not indicate, in most instances, that there is a clinical depression present." E/C Ex. 1 at p 41. Dr. Rogozinski stated that on occasion he has referred patients to a psychiatrist or a psychologist for counseling, when necessary. E/C Ex. 1 at p 42. He specifically testified that in this case he did not feel the referral to a psychiatrist or psychologist was medically necessary. E/C Ex. 1, p 42. Dr. Rogozinski's testimony was taken on April 21, 2000, after having seen the claimant most recently in November of 1999. I find that Dr. Rogozinski's testimony with regard to the physical and psychiatric issues was credible, substantial, and conclusive on the issue.

Additionally, I note the testimony of Rick H. Robinson, the employer's vocational rehabilitation expert. Mr. Robinson indicated that when he discussed employability with the claimant, the claimant repeatedly tried to make the case that he was not able to work in any capacity. However, as Mr. Robinson indicated, the claimant was able to tolerate the vocational evaluation that lasted approximately six hours, and was still able to walk approximately one-half mile to get to a bus stop when a closer bus stop was located just outside the evaluation location. E/C Ex. 5 This contradicts claimant's testimony.. Tr. at 28-29. I find the claimant's credibility to be questionable and his statements to be of little value, if any.

A review of the testimony given by Mr. Spruance, a vocational expert, indicates that he first saw the claimant in March of 1998. Based solely on the history given to him by the claimant, Mr. Spruance determined that the claimant was unable to work. He apparently ignored the fact that Dr. Rogozinski had placed the claimant at a medium level of work. Subsequently, Mr. Spruance reviewed records from the VA and from Charter-By-The-Sea. After noting the GAF scores contained in those records, he testified that those scores were incompatible with employment. However, as noted previously, Mr. Spruance admitted that the GAF scores are "not exactly a psychiatric limitation." Tr. at 51. Other than Mr. Spruance's testimony on those GAF scores, there is no documentation of record from any psychiatrist giving an opinion under oath with regard to the significance of those scores. Nor is there any opinion from a psychiatrist relating any psychiatric condition to the work-related injury, or assigning any restrictions. Mr. Spruance acknowledged that the only physical restrictions seen anywhere in the records were from Dr. Rogozinski, limiting the claimant to medium exertion with some restriction on bending and stooping. There were no psychiatric restrictions in the record.

I note that Mr. Spruance was not asked to do a labor market survey, nor any testing on the claimant; nor had he been to the docks to review any of the longshoring jobs that were proposed. I find that, as to work restrictions, the vocational opinion of Mr. Spruance does not supersede that of the only medical doctor to testify in this matter. I find that there is no opinion that the psychological condition of the claimant in any way limited his ability to seek employment or diminished the viability of the jobs approved by Dr. Rogozinski. In the absence of testimony to rebut the viability of the jobs approved by Dr. Rogozinski, and based on a complete review of all evidence in the file, I find that the employer has established the availability of suitable alternate employment.

Post-injury Wage Earning Capacity

This matter was also remanded for a reconsideration of the inquiry regarding the claimant's post-injury wage-earning capacity. I was directed to determine the capacity of the claimant to earn wages under normal employment conditions compared to the claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (Cir. 1985). An administrative law judge is required to discuss and weigh all relevant evidence when rendering a decision. Even though I did not initially calculate a figure based on hourly rates in order that an inflation adjusted figure could be compared to the claimant's pre-injury average weekly wage, there is sufficient documentation in the record to support the finding of no loss of wage earning capacity.

Although numerous jobs shown by the labor market survey to be available at a rate of pay as low as $5.15 per hour, the majority of the jobs and the longshoring positions were much higher. Given that the claimant had worked since 1980 in the longshore industry, it is most reasonable to assume that jobs within that industry would be more readily available to the claimant and that the claimant would more readily seek an available higher paying job, if he were interested in looking for one. The lowest paying longshore job, at $21.25 per hour, correlates on a 40 hour work week to an average weekly wage of $850.00 per week. This number is more than twice the claimant's average weekly wage and, going through the calculations of comparison to the national average weekly wage, seemed moot. However, I have now included calculations.

In 1996 the national average weekly wage was $400.53. In the year 2000, at the time of the hearing on this claim and at the time all hourly rates were placed in the record, the national average weekly wage was $466.91. The discount factor is therefore .86 ($400.53 divided by $466.91). Applying that factor to the lowest available longshore job reduces the actual earnings to $731 per week. This greatly exceeds the claimant's average weekly wage of $399.61. By using the salaried longshore positions, the lowest of which was $25,000 per year, I accepted the lowest in the longshore range of salaries for the purposes of establishing a wage earning capacity. At $25,000 per year, the weekly earning capacity is $480.77 and, when applying the adjusted factor of .86, the earning capacity is $413.46. This still exceeds the claimant's average weekly wage. The decision to accept these longshore jobs as the most credible range of jobs for establishing earning capacity was rational and supported by the evidence.

As a treating physician, Dr. Rogozinski had approved all of these jobs, as well as the hustler driver with Coastal Maritime which paid $16.00 per hour and was a non-longshore position. At $16.00 per hour and 40 hours per week, applying the discount factor, the earning capacity is still $550.40, well in excess of the claimant's average weekly wage. As a high school graduate, service veteran and father of three minor children, it is most reasonable to assume that the claimant would seek the highest paying jobs available in the market, especially since those jobs are available in the same industry he has worked in for 20 years.

The Board has suggested that an average of the salaries of positions identified as being suitable for the claimant is a reasonable method for determining post-injury wage earning capacity. In this particular case, the volume of jobs and the potential for longshore jobs with other employers makes it difficult to truly average. Rick Robinson testified that the longshore positions he described as being approved by Dr. Rogozinski were available with all the other employers on the docks. The job analysis describes a job but there are numerous openings at any given time on all the ships. In comparison, the non-longshore jobs define one specific opening at a specific given time. A more reasonable method may be to take the median wage, based on the lowest at $5.15 per hour and the highest at $25.00 per hour. The mean of all jobs presented is $15.08 per hour. Based on a 40 hour work week, the average weekly wage would be $603 and reduced to account for inflation results in an average weekly wage of $518.58, still in excess of the claimant's average weekly wage at the time of injury.

The opinions of the vocational providers in the case are clearly distinguished by the facts upon which they testified. Mr. Spruance, the rehabilitation counselor, testified on behalf of the claimant and gave an opinion that the claimant could not work based on his physical and psychological limitations, although he admitted that there were no psychiatric restrictions in the record. He also must have failed to recognize the fact that the treating physician, Dr. Rogozinski, had placed the claimant in a medium level of work capacity. Although the opinion of a vocational counselor is necessary and can be credible, it is limited to the expertise of a vocational rehabilitation counselor, and does not supersede the opinions of medical physicians.

Rick H. Robinson testified on behalf of the employer and completed the most recent vocational assessment, labor market survey, and job review. Mr. Robinson testified that he had been on the docks and was aware of the positions and knew of the availability. He also testified that the claimant, contrary to his testimony, was able to sit for lengthy periods of time during the testing and then walk half a mile to a bus stop when a closer bus stop was just outside the evaluation location. The total evaluation lasted approximately six hours. He felt that the claimant had the capacity to work in the longshore industry in the jobs approved or outside the industry, but with a similar job at Coastal Marine earning $16.00 per hour.

Entitlement to Continuing Permanent Partial Disability (Nominal Award)

A nominal, or de minimis award can be awarded according to *Metropolitan Stevedore company v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), if there is a significant possibility of future capacity loss. In other words, even if the claimant has no loss of wage earning capacity at the present time, if he can show that there is a significant possibility that he will have a loss of wage earning capacity in the future, some consideration can be given to a de minimis award.

There is no clear definition of what is required to prove the "significant possibility of future capacity loss." It would seem to require at least some evidence or testimony from a medical provider that he claimant's condition would inevitably deteriorate or that, due to the nature of his injury, it is not likely that he would continue to earn at his present capacity. A review of the record reveals no such testimony. In fact, Dr. Rogozinski has testified that the claimant has remained stable since his release at maximum medical improvement in 1998. Without some testimony that the earning capacity of the claimant will decrease in the future, there is no basis for awarding a nominal award.

CONCLUSION

The employer has established the availability of suitable alternate employment through the approvals of the only medical expert of record, Dr. Rogozinski, and the testimony of the employer's vocational expert, Rick Robinson. The availability of suitable alternate employment takes into account all physical and psychological restrictions contained in the record. It further takes into account all evidence of record concerning the claimant's psychological condition and weighs the evidence. In addition, the claimant's post-injury wage-earning capacity based on the showing of suitable alternate employment greatly exceeds his average weekly wage at the time of the injury, even taking into account a reduction for inflation. This finding is based on the substantial weight of the evidence and is un-contradicted. With an earning capacity in excess of the average weekly wage at the time of the injury and no documentation of record that his condition is likely to deteriorate in the future, there is no entitlement to a continuing permanent partial disability in the form of a nominal award.

ORDER

The original Decision and Order is amended to reflect the above Findings of Fact stated in this Decision and Order on Remand. In all other respects, the Original Decisions and Order remains in effect. I find that no further benefits are due since the claimant does not have a reduced wage-earning capacity.

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MOLLIE W. NEAL
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, 200 Constitution Avenue, NW, Room N-2117, Washington, D.C. 20210.